United Nations A/73/142

General Assembly

eneral
2018

Original: English

Seventy-third session

Request for the inclusion of an item in the provisional agenda of the seventy-third session

Observer status for the New Development Bank in the General Assembly

Letter dated 2 July 2018 from the Permanent Representatives of Brazil, China, India, the Russian Federation and South Africa to the United Nations addressed to the Secretary-General

Pursuant to rule 13 of the rules of procedure of the General Assembly, we have the honour to request the inclusion of an item entitled "Observer status for the New Development Bank in the General Assembly" in the provisional agenda of the seventy-third session of the General Assembly.

The New Development Bank is an international intergovernmental organization that mobilizes resources for infrastructure and sustainable development in Brazil, the Russian Federation, India, China and South Africa (the BRICS countries) and other emerging economies and developing countries, complementing the existing efforts of multilateral and regional financial institutions for global growth and development. The Bank was established through an agreement among the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa, and its membership is open to States Members of the United Nations.

In accordance with rule 20 of the rules of procedure of the General Assembly, enclosed herewith are an explanatory memorandum (annex I), a draft resolution (annex II) and the Agreement on the New Development Bank (annex III).

We should be grateful if you would have the present letter and its annexes circulated as a document of the General Assembly.

(*Signed*) Mauro **Vieira**
Permanent Representative of the Federative Republic of Brazil

(*Signed*) **Ma** Zhaoxu
Permanent Representative of the People's Republic of China

18-11763 (E) 200718

Please recycle

(*Signed*) Syed **Akbaruddin**
Permanent Representative of the Republic of India

(*Signed*) Vassily A. **Nebenzia**
Permanent Representative of the Russian Federation

(*Signed*) Jerry Matthews **Matjila**
Permanent Representative of the Republic of South Africa

Annex I

Explanatory memorandum

The New Development Bank is an international institution for mobilizing resources for infrastructure and sustainable development projects in the BRICS countries and other emerging economies and developing countries, established by the Agreement on the New Development Bank among the Governments of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa of 15 July 2014 ("the Agreement"). The Agreement entered into force on 3 July 2015.

In accordance with its Articles of Agreement, the New Development Bank possesses full international personality. It possesses full juridical personality and has full capacity to contract, to acquire and dispose of immovable and movable property, as well as to institute legal proceedings. The Bank is afforded immunities and privileges in accordance with its Articles of Agreement.

The organization structure of the Bank includes a Board of Governors, a Board of Directors, a President, Vice-Presidents and other officers and staff of the Bank. According to the Agreement, the Bank, its officers and employees shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned.

The founding members of the Bank are the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa. The membership of the Bank shall be open to States Members of the United Nations in accordance with the provisions of its Articles of Agreement.

To fulfil its purpose of mobilizing resources for infrastructure and sustainable development projects in the BRICS countries and other emerging economies and developing countries, the Bank supports public or private projects through loans, guarantees, equity participation and other financial instruments. It also cooperates with international organizations and other financial entities, and provides technical assistance for projects to be supported by the Bank.

The initial authorized capital of the Bank is $100 billion and the initial subscribed capital is $50 billion. The initial authorized capital of the Bank shall be divided into 1,000,000 shares, having a par value of $100,000, each available for subscription by members.

We believe that the New Development Bank can contribute positively to the socioeconomic development of emerging economies and developing countries and be a useful collaborator for global growth and development through the provision of tangible assistance for infrastructure and sustainable development projects in developing and emerging countries. Furthermore, the New Development Bank is mandated by its Articles of Agreement to cooperate with international organizations and other financial entities.

Thus, the activities of the New Development Bank as an international institution for promoting development are consonant with the purposes and principles of the United Nations in the socioeconomic field.

We are convinced that granting the Bank observer status in the General Assembly would help to establish a firm basis for regular and well-organized cooperation between the New Development Bank and the United Nations that would benefit global growth and development.

Annex II

Draft resolution

Observer status for the New Development Bank in the General Assembly

The General Assembly,

Noting the aspiration of the New Development Bank to develop its cooperation with the United Nations,

1. *Decides* to invite the New Development Bank to participate in the sessions and the work of the General Assembly in the capacity of observer;

2. *Requests* the Secretary-General to take the necessary action to implement the present resolution.

Annex III

Agreement on the New Development Bank – Fortaleza, 15 July

The Governments of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa, collectively the BRICS countries,

RECALLING the decision taken in the fourth BRICS Summit in New Delhi in 2012 and subsequently announced in the fifth BRICS Summit in Durban in 2013 to establish a development bank;

RECOGNIZING the work undertaken by the respective finance ministries;

CONVINCED that the establishment of such a Bank would reflect the close relations among the BRICS countries, while providing a powerful instrument for increasing their economic cooperation;

MINDFUL of a context where emerging market economies and developing countries continue to face significant financing constraints to address infrastructure gaps and sustainable development needs;

Have agreed on the establishment of the New Development Bank (NDB), hereinafter referred to as the Bank, which shall operate in accordance with the provisions of the annexed Articles of Agreement, that constitute an integral part of this Agreement.

Article 1
Purpose and Functions

The Bank shall mobilize resources for infrastructure and sustainable development projects in BRICS and other emerging economies and developing countries, complementing the existing efforts of multilateral and regional financial institutions for global growth and development.

To fulfill its purpose, the Bank shall support public or private projects through loans, guarantees, equity participation and other financial instruments. It shall also cooperate with international organizations and other financial entities, and provide technical assistance for projects to be supported by the Bank.

Article 2
Membership, Voting, Capital and Shares

The founding members of the Bank are the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa.

The membership shall be open to members of the United Nations, in accordance with the provisions of the Articles of Agreement of the New Development Bank. It shall be open to borrowing and non-borrowing members.

The New Development Bank shall have an initial subscribed capital of US$ 50 billion and an initial authorized capital of US$ 100 billion. The initial subscribed capital shall be equally distributed amongst the founding members. The voting power of each member shall equal its subscribed shares in the capital stock of the Bank.

Article 3
Headquarters, Organization and Management

The Bank will have its Headquarters in Shanghai.

The Bank shall have a Board of Governors, a Board of Directors, a President and Vice-Presidents. The President of the Bank shall be elected from one of the founding members on a rotational basis, and there shall be at least one Vice President from each of the other founding members.

The operations of the Bank shall be conducted in accordance with sound banking principles.

Article 4
Entry into force

This Agreement with its Annex shall enter into force when the instruments of acceptance, ratification or approval have been deposited by all BRICS countries, in accordance with the provisions set forth in the Articles of Agreement of the New Development Bank.

Done in the city of Fortaleza, on the 15th of July of 2014, in a single original in the English language.

ANNEX

ARTICLES OF AGREEMENT OF THE NEW DEVELOPMENT BANK

The Governments of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China, and the Republic of South Africa (collectively the BRICS countries):

CONSIDERING the importance of closer economic cooperation among the BRICS countries;

RECOGNIZING the importance of providing resources for projects for the promotion of infrastructure and sustainable development in the BRICS countries and other emerging economies and developing countries;

CONVINCED of the necessity of creating a new international financial institution in order to intermediate resources for the above mentioned purposes;

DESIROUS to contribute to an international financial system conducive to economic and social development respectful of the global environment;

HAVE AGREED as follows:

Chapter I - Establishment, Purposes, Functions and Headquarters

Article 1 – Establishment

The New Development Bank (hereinafter "the Bank"), established by this Agreement, shall operate in accordance with the following provisions.

Article 2 – Purposes

The purpose of the Bank shall be to mobilize resources for infrastructure and sustainable development projects in BRICS and other emerging market economies and developing countries to complement the existing efforts of multilateral and regional financial institutions for global growth and development.

Article 3 – Functions

To fulfill its purpose, the Bank is authorized to exercise the following functions:

(i) to utilize resources at its disposal to support infrastructure and sustainable development projects, public or private, in the BRICS and other emerging market economies and developing countries, through the provision of loans, guarantees, equity participation and other financial instruments;

(ii) to cooperate as the Bank may deem appropriate, within its mandate, with international organizations, as well as national entities whether public or private, in particular with international financial institutions and national development banks;

(iii) to provide technical assistance for the preparation and implementation of infrastructure and sustainable development projects to be supported by the Bank;

(iv) to support infrastructure and sustainable development projects involving more than one country;

(v) to establish, or be entrusted with the administration, of Special Funds which are designed to serve its purpose.

Article 4 – Headquarters

(a) The Bank has its headquarters in Shanghai.

(b) The Bank may establish offices necessary for the performance of its functions. The first regional office shall be in Johannesburg.

Chapter II - Membership, Voting, Capital and Shares

Article 5 – Membership

(a) The founding members of the Bank are the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China, and the Republic of South Africa.

(b) Membership shall be open to members of the United Nations at such times and in accordance with such terms and conditions as the Bank shall determine by a special majority at the Board of Governors.

(c) Membership of the Bank shall be open to borrowing and non-borrowing members.

(d) The Bank may accept, as decided by the Board of Governors, International Financial Institutions as observers at the meetings of the Board of Governors. Countries interested in becoming members may also be invited as observers to these meetings.

Article 6 – Voting

(a) The voting power of each member shall be equal to the number of its subscribed shares in the capital stock of the Bank. In the event of any member failing to pay any part of the amount due in respect of its obligations in relation to paid-in shares under Article 7 of this Agreement, such member shall be unable, for so long as such failure continues, to exercise that percentage of its voting power which corresponds to the percentage which the amount due but unpaid bears to the total

amount of paid-in shares subscribed to by that member in the capital stock of the Bank.

(b) Except as otherwise specifically provided for in this Agreement, all matters before the Bank shall be decided by a simple majority of the votes cast. Where provided for in this Agreement, a qualified majority shall be understood as an affirmative vote of two thirds of the total voting power of the members. Where provided for in this Agreement, a special majority shall be understood as an affirmative vote of four of the founding members concurrent with an affirmative vote of two thirds of the total voting power of the members.

(c) In voting in the Board of Governors, each governor shall be entitled to cast the votes of the member country which he represents.

(d) In voting in the Board of Directors each director shall be entitled to cast the number of votes that counted toward his election, which votes need not be cast as a unit.

Article 7 – Authorized and Subscribed Capital

(a) The initial authorized capital of the Bank shall be one hundred billion dollars (US$ 100,000,000,000). The dollar wherever referred to in this Agreement shall be understood as being the official currency of payment of the United States of America.

(b) The initial authorized capital of the Bank shall be divided into 1,000,000 (one million) shares, having a par value of one hundred thousand dollars (US$ 100,000) each, which shall be available for subscription only by members in accordance with the provisions of this Agreement. The value of 1 (one) share, will also be the minimum amount to be subscribed for participation by a single country.

(c) The initial subscribed capital of the Bank shall be fifty billion dollars (US$ 50,000,000,000). The subscribed capital stock shall be divided into paid-in shares and callable shares. Shares having an aggregate par value of ten billion dollars (US$ 10,000,000,000) shall be paid-in shares, and shares having an aggregate par value of forty billion dollars (US$ 40,000,000,000) shall be callable shares.

(d) An increase of the authorized and subscribed capital stock of the Bank, as well as the proportion between the paid in shares and the callable shares may be decided by the Board of Governors at such time and under such terms and conditions as it may deem advisable, by a special majority of the Board of Governors. In such case, each member shall have a reasonable opportunity to subscribe, under the conditions established in Article 8 and under such other conditions as the Board of Governors shall decide. No member, however, shall be obligated to subscribe to any part of such increased capital.

(e) The Board of Governors shall at intervals of not more than 5 (five) years review the capital stock of the Bank.

Article 8 – Subscription of Shares

(a) Each member shall subscribe to shares of the capital stock of the Bank. The number of shares to be initially subscribed by the founding members shall be those set forth in Attachment 1 of this Agreement, which specifies the obligation of each member as to both paid-in and callable capital. The number of shares to be initially subscribed by other members shall be determined by the Board of Governors by special majority on the occasion of the acceptance of their accession.

(b) Shares of stock initially subscribed by founding members shall be issued at par. Other shares shall be issued at par unless the Board of Governors decides in special circumstances to issue them on other terms.

(c) No increase in the subscription of any member to the capital stock shall become effective, and any right to subscribe thereto is hereby waived, which would have the effect of:

(i) reducing the voting power of the founding members below 55 (fifty-five) per cent of the total voting power;

(ii) increasing the voting power of the non-borrowing member countries above 20 (twenty) per cent of the total voting power; (iii)increasing the voting power of a non-founding member country above 7 (seven) per cent of total voting power.

(d) The liability of the members on shares shall be limited to the unpaid portion of their issue price.

(e) No member shall be liable, by reason of its membership, for obligations of the Bank.

(f) Shares shall not be pledged nor encumbered in any manner. They shall be transferable only to the Bank.

Article 9 – Payment of Subscriptions

(a) On entry into force of this Agreement, payment of the amount initially subscribed by each founding member to the paid-in capital stock of the Bank shall be made in dollars in 7 (seven) installments as provided for in Attachment 2. The first installment shall be paid by each member within 6 (six) months after entry into force of this Agreement. The second installment shall become due 18 (eighteen) months from the entry into force of this Agreement. The remaining 5 (five) installments shall each become due successively 1 (one) year from the date on which the preceding installment becomes due.

(b) The Board of Governors shall determine the dates for the payment of amounts subscribed by the members of the Bank to the paid-in capital stock to which the provisions of paragraph (a) of this article do not apply.

(c) Payment of the amounts subscribed to the callable capital stock of the Bank shall be subject to call only as and when required by the Bank to meet its obligations incurred on borrowing of funds for inclusion in its ordinary capital resources or guarantees chargeable to such resources. In the event of such calls, payment may be made at the option of the member concerned in convertible currency or in the currency required to discharge the obligation of the Bank for the purpose of which the call is made.

(d) Calls on unpaid subscriptions shall be uniform in percentage on all callable shares.

Chapter III - Organization and Management

Article 10 – Structure

The Bank shall have a Board of Governors, a Board of Directors, a President, Vice-Presidents as decided by the Board of Governors, and such other officers and staff as may be considered necessary.

Article 11 – Board of Governors: composition and powers

(a) All the powers of the Bank shall be vested in the Board of Governors consisting of one governor and one alternate appointed by each member in such manner as it may determine. Governors shall be at ministerial level, and may be replaced subject to the pleasure of the member appointing him. No alternate may vote except in the absence of his principal. The Board shall on an annual basis select one of the governors as chairperson.

(b) The Board of Governors may delegate to the Directors authority to exercise any powers of the Board, except the power to:

(i) admit new members and determine the conditions of their admission;

(ii) increase or decrease the capital stock;

(iii) suspend a member;

(iv) amend this Agreement;

(v) decide appeals from interpretations of this agreement given by the Directors;

(vi) authorize the conclusion of general agreements for cooperation with other international organizations;

(vii) determine the distribution of the net income of the Bank;

(viii) decide to terminate the operations of the Bank and to distribute its assets;

(ix) decide on the number of additional Vice-Presidents;

(x) elect the President of the Bank;

(xi) approve a proposal by the Board of Directors to call capital;

(xii) approve the General Strategy of the Bank every 5 (five) years.

(c) The Board of Governors shall hold an annual meeting and such other meetings as may be provided for by the Board or called by the Directors. Meetings of the Board shall be called by the Directors whenever requested by members, the number of which shall be determined by the Board of Governors from time to time.

(d) A quorum for any meeting of the Board of Governors shall be a majority of the Governors, exercising not less than two thirds of the total voting power.

(e) The Board of Governors may by regulation establish a procedure whereby the Directors, when they deem such action to be in the best interests of the Bank, may obtain a vote of the Governors on a specific question without calling a meeting of the Board.

(f) The Board of Governors, and the Directors to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank.

(g) Governors and alternates shall serve as such without compensation from the Bank.

(h) The Board of Governors shall determine the salary and terms of the contract of service of the President.

(i) The Board of Governors shall retain full power to exercise authority over any matter delegated to the Board of Directors under paragraph (a) of Article 12.

Article 12 – Board of Directors

(a) The Board of Directors shall be responsible for the conduct of the general operations of the Bank, and for this purpose, shall exercise all the powers delegated to them by the Board of Governors, and in particular:

(i) in conformity with the general directions of the Board of Governors, take decisions concerning business strategies, country strategies, loans, guarantees, equity investments, borrowing by the Bank, setting basic operational procedures and charges, furnishing of technical assistance and other operations of the Bank;

(ii) submit the accounts for each financial year for approval of the Board of Governors at each annual meeting; and

(iii) approve the budget of the Bank.

(b) Each of the founding members shall appoint 1 (one) Director and 1 (one) alternate. The Board of Governors shall establish by special majority the methodology by which additional Directors and alternates shall be elected, so that the total number of Directors shall be no more than 10 (ten).

(c) Directors shall serve a term of 2 (two) years and may be re-elected. A Director shall continue in office until his successor has been chosen and qualified. Alternates shall have full power to act for the respective Director when he is not present.

(d) The Board of Directors shall appoint a non-executive chairperson from among the Directors for a mandate of 4 (four) years. If the Director does not serve a full mandate or if he is not re-elected for a second term, the Director that replaces him will serve as chairperson for the remainder of the term.

(e) The Board of Directors shall approve the basic organization of the Bank upon proposal by the President, including the number and general responsibilities of the chief administrative and professional positions of the staff.

(f) The Board of Directors shall appoint a Credit and Investment Committee and may appoint such other committees as it deems advisable. Membership of such committees need not be limited to Governors, Directors, or alternates.

(g) The Board of Directors shall function as a non-resident body, which will meet quarterly, unless the Board of Governors decides otherwise by a qualified majority. If the Board of Governors decides to make the Board of Directors a resident body, the President of the Bank will become henceforth the chairperson of the Board of Directors.

(h) A quorum for any meeting of the Directors shall be a majority of the Directors, exercising not less than two-thirds of the total voting power.

(i) A member of the Bank may send a representative to attend any meeting of the Board of Directors when a matter especially affecting that member is under consideration. Such right of representation shall be regulated by the Board of Governors.

Article 13 – President and Staff

(a) The Board of Governors shall elect a President from one of the founding members on a rotational basis, who shall not be a Governor or a Director or an alternate for either. The President shall be a member of the Board of Directors, but shall have no vote except a deciding vote in case of an equal division. The President may participate in meetings of the Board of Governors, but shall not vote at such meetings. Without prejudice to the mandate established in item (d) below, the

President shall cease to hold office should the Board of Governors so decide by a special majority.

(b) The President shall be chief of the operating staff of the Bank and shall conduct, under the direction of the Directors, the ordinary business of the Bank, and in particular:

(i) being, on this, accountable to the Directors, the President shall be responsible for the organization, appointment and dismissal of the officers and staff, and recommendation of admission and dismissal of Vice Presidents to the Board of Governors;

(ii) the President shall head the credit and investment committee, composed also by the Vice-Presidents, that will be responsible for decisions on loans, guarantees, equity investments and technical assistance of no more than a limit amount to be established by the Board of Directors, provided that no objection is raised by any member of Board of Directors within 30 (thirty) days since such project is submitted to the Board.

(c) There shall be at least 1 (one) Vice-President from each founding member except the country represented by the President. Vice-Presidents shall be appointed by the Board of Governors on the recommendation of the President. Vice-Presidents shall exercise such authority and perform such functions in the administration of the Bank, as may be determined by the Board of Directors.

(d) The President and each Vice-President shall serve for a 5 (five) year term, non-renewable, except for the first term of the first Vice-Presidents, whose mandate shall be for 6 (six) years.

(e) The Bank, its officers and employees shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purpose and functions stated in Articles 2 and 3.

(f) The President, Vice-Presidents, officers and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.

Article 14 - Publication of Reports and Provision of Information

(a) The Bank shall publish an annual report containing an audited statement of the accounts. It shall also transmit quarterly to the members a summary statement of the financial position and a profit-and-loss statement showing the results of its ordinary operations.

(b) The Bank may also publish such other reports as it deems desirable to carry out its purpose and functions.

Article 15 - Transparency and Accountability

The Bank shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

Chapter IV - Operations

Article 16 – Use of Resources

The resources and facilities of the Bank shall be used exclusively to implement the purpose and functions set forth respectively in Articles 2 and 3 of this Agreement.

Article 17 – Depositories

Each member shall designate its central bank as a depository in which the Bank may keep its holdings of such member's currency and other assets of the Bank. If a member has no central bank, it shall, in agreement with the Bank, designate another institution for such purpose.

Article 18 – Categories of Operations

(a) The operations of the Bank shall consist of ordinary operations and special operations. Ordinary operations shall be those financed from the ordinary capital resources of the Bank. Special operations shall be those financed from the Special Funds resources.

(b) The ordinary capital of the Bank shall include the following:

(i) subscribed capital stock of the Bank, including both paid-in and callable shares, except such part thereof as may be set aside into one or more Special Funds;

(ii) funds raised by borrowings of the Bank by virtue of powers conferred by Chapter 5 of this Agreement, to which the commitment to calls provided for in item (c) of Article 9 is applicable;

(iii) funds received in repayment of loans or guarantees and proceeds from the disposal of equity investments made with the resources indicated in (i) and (ii) of this paragraph;

(iv) income derived from loans and equity investments made from the aforementioned funds or from guarantees to which the commitment to calls set forth in item (c) of Article 9 of this Agreement is applicable; and

(v) any other funds or income received by the Bank which do not form part of its Special Funds resources.

(c) The ordinary capital resources and the Special Funds resources of the Bank shall at all times and in all respects be held, used, committed, invested or otherwise disposed of entirely separate from each other. The financial statements of the Bank shall show the ordinary operations and special operations separately.

(d) The ordinary capital resources of the Bank shall, under no circumstances, be charged with, or used to discharge, losses or liabilities arising out of special operations or other activities for which Special Fund resources were originally used or committed.

(e) Expenses appertaining directly to ordinary operations shall be charged to the ordinary capital resources of the Bank. Expenses appertaining directly to the special operations shall be charged to Special Funds resources.

Article 19 – Methods of Operation

(a) The Bank may guarantee, participate in, make loans or support through any other financial instrument, public or private projects, including public-private partnerships, in any borrowing member country, as well as invest in the equity, underwrite the equity issue of securities, or facilitate the access of international capital markets of any business, industrial, agricultural or services enterprise with projects in the territories of borrowing member countries.

(b) The Bank may co-finance, guarantee or co-guarantee, together with international financial institutions, commercial banks or other suitable entities, projects within its mandate.

(c) The Bank may provide technical assistance for the preparation and implementation of projects to be supported by the Bank.

(d) The Board of Governors, by special majority, may approve a general policy under which the Bank is authorized to develop the operations described in the previous items of this article in relation to public or private projects in a non-member emerging economy or developing country, subject to the condition that it involves a materia! interest of a member, as defined by such policy.

(e) The Board of Directors, by special majority, may exceptionally approve a specific public or private project in a non-member emerging economy or developing country involving the operations described in the previous items of this article. Sovereign guaranteed operations in non-members will be priced in full consideration of the sovereign risks involved, given the risk mitigators offered, and any other conditions established as the Board of Directors may decide.

Article 20 – Limitations on Operations

(a) The total amount outstanding in respect of the ordinary operations of the Bank shall not at any time exceed the total amount of its unimpaired subscribed capital, reserves and surplus included in its ordinary capital resources.

(b) The total amount outstanding in respect of the special operations of the Bank relating to any Special Fund shall not at any time exceed the total amount prescribed in the regulations of that Special Fund.

(c) The Bank shall seek to maintain reasonable diversification in its investments in equity capital. It shall not assume responsibility for managing any entity or enterprise in which it has an investment, except where necessary to safeguard its investments.

Article 21 – Operational Principles

The operations of the Bank shall be conducted in accordance with the following principles:

(i) the Bank shall apply sound banking principles to all its operations, ensure adequate remuneration and have in due regard the risks involved;

(ii) the Bank shall not finance any undertaking in the territory of a member if that member objects to such financing;

(iii) in preparing any country program or strategy, financing any project or by making designation or reference to a particular territory, or geographic area in its documents, the Bank will not deem to have intended to make any judgment as to the legal or other status of any territory or area;

(iv) the Bank shall not allow a disproportionate amount of its resources to be used for the benefit of any member. The Bank shall seek to maintain reasonable diversification in all of its investments;

(v) the Bank shall place no restriction upon the procurement of goods and services from any country member from the proceeds of any loan, investment or other financing undertaken in the ordinary or special operations of the Banks, and shall, in all appropriate cases, make its loans and other operations conditional on invitations to all member countries to tender being arranged;

(vi) the proceeds of any loan, investment or other financing undertaken in the ordinary operations of the Bank or with Special Funds established by the Bank shall be used only for procurement in member countries of goods and services produced in member countries, except in any case in which the Board of Directors determines to permit procurement in a non-member country of goods and services produced in a non-member country in special circumstances making such procurement appropriate;

(vii) the Bank shall take the necessary measures to ensure that the proceeds of any loan made, guaranteed or participated in by the Bank, or any equity investment, are used only for the purposes for which the loan or the equity investment was granted and with due attention to considerations of economy and efficiency.

Article 22 – Terms and Conditions

(a) In the case of loans made, participated in, or guaranteed by the Bank and equity investments, the contract shall establish the terms and conditions for the loan, guarantee or equity investment concerned in accordance with the policies established by the Board of Directors, including, as the case may be, those relating to payment of principal, interest and other fees, charges, commissions, maturities, currency and dates of payment in respect of the loan, guarantee or equity investment, in accordance with the policies of the Bank. In setting such policies, the Board of Directors shall take fully into account the need to safeguard its income.

(b) In underwriting the sale of securities, the Bank shall charge fees under the terms and conditions established in the policies of the Bank.

Article 23 – Special Funds

(a) The establishment and administration of Special Funds by the Bank shall be approved by the Board of Governors by a qualified majority and shall follow the purposes set forth in Article 2 of this Agreement.

(b) Except when the Board of Governors specifies otherwise, the Special Funds shall be accountable and its operations subjected to the Board of Directors.

(c) The Bank may adopt such special rules and regulations as may be required for the establishment, administration and use of each Special Fund.

Article 24 – Provision of Currencies

The Bank in its operations may provide financing in the local currency of the country in which the operation takes place, provided that adequate policies are put in place to avoid significant currency mismatch.

Article 25 – Methods of Meeting the Losses of the Bank

(a) In cases of default on loans made, participated in or guaranteed by the Bank in its ordinary operations, the Bank shall take, firstly, all necessary actions as it deems appropriate in order to recover the loans made and, secondly, it may modify the terms of the loans, other than the currency of repayment.

(b) Losses arising in the Bank's ordinary operation shall be charged:

(i) first, to the provisions of the Bank;

(ii) second, to net income;

(iii) third, against the special reserve;

(iv) fourth, against the general reserve and surpluses;

(v) fifth, against the unimpaired paid-in capital, and

(vi) last, against an appropriate amount of the uncalled subscribed callable capital which shall be called in accordance with the provisions of paragraphs (c) and (d) of Article 9 of these Articles of Agreement.

(c) In deploying its efforts for credit recovery in case of default, the Bank shall seek the assistance of the authorities of the country where the operation takes place.

Chapter V - Borrowing and other Additional Powers

Article 26 – General Powers

In addition to the powers specified elsewhere in this Agreement, the Bank shall have the power to:

(a) borrow funds in member countries or elsewhere, and in this connection to furnish such collateral or other security therefore as the Bank shall determine, provided always that:

(i) before making a sale of its obligations in the territory of a member country, the Bank shall have obtained its approval;

(ii) where the obligations of the Bank are to be denominated in the currency of a member, the bank shall have obtained its approval;

(iii) the Bank shall obtain the approval of the countries referred to in sub-paragraphs (i) and (ii) of this paragraph that the proceeds may be exchanged without restriction for other currencies; and

(iv) before determining to sell its obligations in a particular country, the Bank shall consider the amount of previous borrowing, if any, in that country, the amount of previous borrowing in other countries, and the possible availability of funds in such other countries; and shall give due regard to the general principle that its borrowings should to the greatest extent possible be diversified as to country of borrowing.

(b) buy and sell securities the Bank has issued or guaranteed or in which it has invested, provided always that it shall have obtained the approval of any country in whose territory the securities are to be bought or sold;

(c) guarantee securities in which it has invested in order to facilitate their sale;

(d) underwrite, or participate in the underwriting of, securities issued by any entity or enterprise for purposes consistent with the purpose of the Bank;

(e) invest funds, not needed in its operations, in such obligations as it may determine, and invest funds held by the Bank for pensions or similar purposes in marketable securities. In doing so, the Bank shall give due consideration to invest such funds in the territories of members in obligations of members or nationals thereof;

(f) exercise such other powers and establish such rules and regulations as may be necessary or appropriate in furtherance of its purpose and functions, consistent with the provisions of this Agreement.

Article 27 – Notice to be placed on Securities

Every security issued or guaranteed by the Bank shall bear on its face a conspicuous statement to the effect that it is not an obligation of any Government, unless it is in fact the obligation of a particular Government, in which case it shall so state.

Chapter VI - Status, Immunities and Privileges

Article 28 – Purpose of the Chapter

To enable the Bank effectively to fulfill its purpose and carry out the functions entrusted to it, the status, immunities, exemptions and privileges set forth in this Chapter shall be accorded to the Bank in the territory of each member.

Article 29 – Status

(a) The Bank shall possess full international personality.

(b) In the territory of each member the Bank shall possess full juridical personality and, in particular, full capacity to:

(i) contract;

(ii) acquire and dispose of immovable and movable property; and

(iii) institute legal proceedings.

Article 30 – Position of the Bank with Regard to Judicial Process

(a) The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the territory of a country in which the Bank has its headquarters or offices, or has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

(b) Notwithstanding the provisions of paragraph (a) of this Article, no action shall be brought against the Bank by any member, or by any agency or instrumentality of a member, or by any entity or person directly or indirectly acting for or deriving claims from a member or from any agency or instrumentality of a member. Members shall have recourse to such special procedures for the settlement of controversies between the Bank and its members as may be prescribed in this Agreement, in the by-laws and regulations of the Bank, or in contracts entered into with the Bank.

(c) Property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

Article 31 – Freedom and Immunity of Assets and Archives

(a) Property and assets of the Bank, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action.

(b) The archives of the Bank and, in general, all documents belonging to it or held by it, shall be inviolable, wherever located.

(c) To the extent necessary to carry out the purpose and functions of the Bank and subject to the provisions of this Agreement, all property and other assets of the

Bank shall be exempt from restrictions, regulations, controls and moratoria of any nature.

Article 32 – Privilege for Communications

The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members.

Article 33 – Personal Immunities and Privileges

All Governors, Directors, alternates, officers, and employees of the Bank shall have the following privileges and immunities:

(i) immunity from legal process with respect to acts performed by them in their official capacity, except when the Bank waives this immunity;

(ii) when not local nationals, the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange provisions as are accorded by members to the representatives, officials, and employees of comparable rank of other members;

(iii) the same privileges in respect of traveling facilities as are accorded by members to representatives, officials, and employees of comparable rank of other members.

Article 34 – Exemption from Taxation

(a) The Bank, its property, other assets, income, transfers and the operations and transactions it carries out pursuant to this Agreement, shall be immune from all taxation, from all restrictions and from all customs duties. The Bank shall also be immune from any obligation relating to the payment, withholding or collection of any tax, or duty.

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to Directors, alternates, officers or employees of the Bank, including experts performing missions for the Bank, except where a member, notwithstanding Article 48(d), deposits with its instrument of ratification, acceptance, approval or accession a declaration that such member retains for itself and its political subdivisions the right to tax salaries and emoluments paid by the Bank to citizens or nationals of such member.

(c) No tax of any kind shall be levied on any obligation or security issued by the Bank, including any dividend or interest thereon, by whomsoever held:

(i) which discriminates against such obligation or security solely because it is issued by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Bank.

(d) No tax of any kind shall be levied on any obligation or security guaranteed by the Bank, including any dividend or interest thereon, by whomsoever held:

(i) which discriminates against such obligation or security solely because it is guaranteed by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the location of any office or place of business maintained by the Bank.

Article 35 – Implementation

Each member, in accordance with its juridical system, shall promptly take such action as is necessary to make effective in its own territory the provisions set forth in the Chapter and shall inform the Bank of the action which it has taken on the matter.

Article 36 – Waiver of Immunities, Privileges and Exemptions

The immunities, privileges and exemptions conferred under this Chapter are granted in the interest of the Bank. The Board of Directors may waive to such extent and upon such conditions as it may determine any of the immunities, privileges and exemptions conferred under this Chapter in cases where such action would, in its opinion, be appropriate in the best interests of the Bank. The President shall have the right and the duty to waive any immunity, privilege or exemption in respect of any officer, employee or expert of the Bank, other than the President and each Vice-President, where, in his or her opinion, the immunity, privilege or exemption would impede the course of justice and can be waived without prejudice to the interests of the Bank. In similar circumstances and under the same conditions, the Board of Directors shall have the right and the duty to waive any immunity, privilege or exemption in respect of the President and each Vice-President.

Chapter VII - Withdrawal and Suspension of Members, Temporary Suspension and Termination of Operations of the Bank

Article 37 – Withdrawal

(a) Any member may withdraw from the Bank by delivering to the Bank at its headquarters written notice of its intention to do so. Such withdrawal shall become finally effective, and the membership shall cease, on the date specified in the notice but in no event less than 6 (six) months after the notice is delivered to the Bank. However, at any time before the withdrawal becomes finally effective, the member may notify the Bank in writing of the cancellation of its notice of intention to withdraw.

(b) After withdrawing, a member shall remain liable for all direct and contingent obligations to the Bank to which it was subject at the date of delivery of the withdrawal notice, including those specified in Article 39. However, if the withdrawal becomes finally effective, the member shall not incur any liability for obligations resulting from operations of the Bank effected after the date on which the withdrawal notice was received by the Bank.

(c) Upon receipt of a notice of withdrawal, the Board of Governors shall adopt procedures for settlement of accounts with the withdrawing Member country, no later than the date upon which the withdrawal becomes effective.

Article 38 – Suspension of Membership

(a) If a member fails to fulfill any of its obligations to the Bank, the Bank may suspend its membership by decision of the Board of Governors by special majority.

(b) The member so suspended shall automatically cease to be a member of the Bank 1 (one) year from the date of its suspension unless the Board of Governors decides by the same majority to terminate the suspension.

(c) While under suspension, a member shall not be entitled to exercise any rights under this Agreement, except the right of withdrawal, but shall remain subject to all its obligations.

(d) The Board of Governors shall adopt regulations as may be necessary for the implementation of this article.

Article 39 – Settlement of Accounts

(a) After a country ceases to be a member, it no longer shall share in the profits or losses of the Bank, nor shall it incur any liability with respect to loans and guarantees entered into by the Bank thereafter. However, it shall remain liable for all amounts it owes the Bank and for its contingent liabilities to the Bank so long as any part of the loans or guarantees contracted by the Bank before the date on which the country ceased to be a member remains outstanding.

(b) When a country ceases to be a member, the Bank shall arrange for the repurchase of such country's capital stock as a part of the settlement of accounts pursuant to the provisions of this Article; but the country shall have no other rights under this Agreement except as provided in this Article and in Article 46.

(c) The Bank and the country ceasing to be a member may agree on the repurchase of the capital stock on such terms as are deemed appropriate in the circumstances, without regard to the provisions of the following paragraph. Such agreement may provide, among other things, for a final settlement of all obligations of the country to the Bank.

(d) If the agreement referred to in the preceding paragraph has not been consummated within 6 (six) months after the country ceases to be a member or such other time as the Bank and such country may agree upon, the repurchase price of such country's capital stock shall be its book value, according to the books of the Bank, on the date when the country ceased to be a member. Such repurchase shall be subject to the following conditions:

(i) the payment may be made in such installments, at such times and in such available currencies as the Bank determines, taking into account the financial position of the Bank;

(ii) any amount which the Bank owes the country for the repurchase of its capital stock shall be withheld to the extent that the country or any of its subdivisions or agencies remains liable to the Bank as a result of loan or guarantee operations. The amount withheld may, at the option of the Bank, be applied on any such liability as it matures. However, no amount shall be withheld on account of the country's contingent liability for future calls on its subscription pursuant to Article 9(c);

(iii) if the Bank sustains net losses on any loans or participations, or as a result of any guarantees, outstanding on the date the country ceased to be a member, and the amount of such losses exceeds the amount of the reserves provided therefore on such date, such country shall repay on demand the amount by which the repurchase price of its shares would have been reduced, if the losses had been taken into account when the book value of the shares, according to the books of the Bank, was determined. In addition, the former member shall remain liable on any call pursuant to Article 9(c), to the extent that it would have been required to respond if the impairment of capital had occurred and the call had been made at the time the repurchase price of its shares had been determined.

(e) In no event shall any amount due to a country for its shares under this section be paid until 12 (twelve) months after the date upon which the country ceases

to be a member. If within that period the Bank terminates operations, all rights of such country shall be determined by the provisions of Articles 41 to 43, and such country shall be considered still a member of the Bank for the purposes of such articles except that it shall have no voting rights.

Article 40 – Temporary Suspension of Operations

In an emergency, the Board of Directors may suspend temporarily operations in respect of new loans, guarantees, underwriting, technical assistance and equity investments pending an opportunity for further consideration and action by the Board of Governors.

Article 41 – Termination of Operations

The Bank may terminate its operations as decided by the Board of Governors by special majority. Upon such termination of operations the Bank shall forthwith cease all activities, except those incidents to the orderly realization, conservation and preservation of its assets and settlement of its obligations.

Article 42 – Liability of Members and Payment of Claims

(a) The liability of all members arising from the subscriptions to the capital stock of the Bank and in respect to the depreciation of their currencies shall continue until all direct and contingent obligations shall have been discharged.

(b) All creditors holding direct claims shall be paid out of the assets of the Bank and then out of payments to the Bank on unpaid or callable subscriptions. Before making any payments to creditors holding direct claims, the Board of Directors shall make such arrangements as are necessary, in its judgment, to ensure a pro rata distribution among holders of direct and contingent claims.

Article 43 – Distribution of Assets

(a) No distribution of assets shall be made to members on account of their subscriptions to the capital stock of the Bank until all liabilities to creditors chargeable to such capital stock shall have been discharged or provided for. Moreover, such distribution must be approved by a decision of the Board of Governors by special majority.

(b) Any distribution of the assets of the Bank to the members shall be in proportion to capital stock held by each member and shall be effected at such times and under such conditions, as the Bank shall deem fair and equitable. The shares of assets distributed need not be uniform as to type of assets. No member shall be entitled to receive its share in such a distribution of assets until it has settled all of its obligations to the Bank.

(c) Any member receiving assets distributed pursuant to this article shall enjoy the same rights with respect to such assets as the Bank enjoyed prior to their distribution.

Chapter VIII - Amendments, Interpretation and Arbitration

Article 44 – Amendments

(a) This Agreement may be amended only by decision of the Board of Governors by special majority.

(b) Any proposal to introduce modifications in this Agreement, whether emanating from a member, a Governor or the Board of Directors, shall be communicated to the chairperson of the Board of Governors who shall bring the proposal before the Board. If the proposed amendment is approved by the Board, the Bank shall ask all members whether they accept the proposed amendment. When the amendment is accepted, ratified or approved by 2/3 (two thirds) of the members, the Bank shall certify the fact by formal communication addressed to all members.

(c) The amendments shall enter into force for all members 3 (three) months after the date of the formal communication provided for in paragraph (b) of this article, unless the Board of Governors specify a different period.

Article 45 – Interpretation

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Board of Directors for decision.

(b) Members especially affected by the question under consideration shall be entitled to direct representation before the Board of Directors as provided in Article 12(i).

(c) In any case where the Board of Directors has given a decision under (a) above, any member may require that the question be submitted to the Board of Governors, whose decision shall be final. Pending the decision of the Board of Governors, the Bank may, so far as it deems it necessary, act on the basis of the decision of the Board of Directors.

Article 46 – Arbitration

(a) If a disagreement should arise between the Bank and a country which has ceased to be a member, or between the Bank and any member after adoption of a decision to terminate the operation of the Bank, such disagreement shall be submitted to arbitration by a tribunal of 3 (three) arbitrators. One of the arbitrators shall be appointed by the Bank, another by the country concerned, and the third, unless the parties otherwise agree, by an authority as may approved by the Board of Governors. If all efforts to reach a unanimous agreement fail, decisions shall be made by a majority vote of the 3 (three) arbitrators.

(b) The third arbitrator shall be empowered to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

(c) Any disagreement concerning a contract between the Bank and a borrowing country shall be settled according to the respective contract.

Article 47 – Approval deemed given

Whenever the approval of any member is required before any act may be done by the Bank, approval shall be deemed to have been given unless the member presents an objection within such reasonable period as the Bank may fix in notifying the member of the proposed act.

Chapter IX – Final Provisions

Article 48 – Acceptance

(a) Each signatory country shall deposit with the government of the Federative Republic of Brazil an instrument setting forth that it has accepted, ratified or approved this Agreement in accordance with its own laws.

(b) The Government of the Federative Republic of Brazil shall send certified copies of this Agreement to the signatories and duly notify them of each deposit of the instrument of acceptance, ratification or approval made pursuant to the foregoing paragraph, as well as the date thereof.

(c) After the date on which the Bank commences operations, the Government of the Federative Republic of Brazil may receive the instrument of accession to this Agreement from any country whose membership has been approved in accordance with Article 5(b).

(d) The acceptance, ratification or approval of the Agreement, or the accession thereto, shall not contain any objection or reservation.

Article 49 – Entry into Force

(a) This Agreement shall enter into force when instruments of acceptance, ratification or approval have been deposited, in accordance with Article 48 by all BRICS countries.

(b) BRICS countries whose instruments of acceptance, ratification or approval were deposited prior to the date on which the Agreement entered into force shall become members on the date it enters into force. Other countries shall become members on the dates on which their instruments of accession are deposited.

Article 50 – Commencement of Operations

The chair of the BRICS countries shall call the first meeting of the Board of Governors as soon as this Agreement enters into force under Article 49 of this Chapter, in order to take the necessary decisions for the initial operation of the Bank.

ATTACHMENT 1

Shares of Initial Subscribed Capital Stock of Founding Members

Each founding member shall initially subscribe 100,000 (one hundred thousand) shares, in a total of ten billion dollars (US$ 10,000,000,000), of which 20,000 (twenty thousand) shares correspond to paid in capital, in a total of two billion dollars (US$ 2,000,000,000) and 80,000 (eighty thousand) shares correspond to callable capital, in a total of eight billion dollars (US$ 8,000,000,000).

ATTACHMENT 2

Payment of Initial Subscriptions to the Paid in Capital by the Founding Members

Installment	Paid in capital per country in million dollars
1	150
2	250
3	300
4	300
5	300
6	350
7	350

United Nations A/73/143

General Assembly

Distr.: General
16 July 2018

Original: English

Seventy-third session

Request for the inclusion of an item in the provisional agenda of the seventy-third session

Safeguarding ocean space for present and future generations

Letter dated 12 July 2018 from the Permanent Representative of Malta to the United Nations addressed to the Secretary-General

I have the honour to request, on behalf of the Government of Malta and in accordance with the rules of procedure of the General Assembly, the inclusion of an item entitled "Safeguarding ocean space for present and future generations" in the provisional agenda of the seventy-third session of the General Assembly.

In accordance with the rules of procedure of the General Assembly, an explanatory memorandum concerning my Government's request is attached hereto (see annex).

(*Signed*) Carmelo **Inguanez**
Ambassador
Permanent Representative

18-11773 (E) 230718

Please recycle

Annex

Explanatory memorandum

1. One of the main goals of the 1967 Malta proposal on the law of the sea to the General Assembly was to ensure that problems of ocean space were dealt with on a holistic basis in the interest of present and future generations. This goal received widespread support and is reflected in the preamble to the 1982 United Nations Convention on the Law of the Sea, wherein the States parties declare that they are conscious that the problems of ocean space are closely interrelated and need to be considered as a whole, using an integrated approach.

2. The 1982 United Nations Convention on the Law of the Sea, known as the constitution for the oceans, remains the cornerstone of global ocean governance. It has set up a legal order which facilitates international communications and promotes peaceful uses of the oceans, the equitable and efficient utilization of their resources, the protection and preservation of the marine environment and the conservation of living resources. Furthermore, with an impressive 168 States parties, many of its norms reflect customary international law.

3. While the Convention recognizes, directly and indirectly, that the problems of ocean space have to be considered as a whole, its general provisions do not effectively ensure that problems related to ocean space are dealt with in an integrated manner. The Convention has been supplemented by numerous valuable legal instruments adopted under the aegis of the United Nations and other international organizations. This process, while contributing greatly to various aspects of global ocean governance, deals with ocean space issues on a sectoral basis. Furthermore, most discussions taking place in international organizations, other than the United Nations, focus on the sectoral implementation of specific provisions of the Convention that fall within their mandate.

4. That approach is inherently fragmented and makes it difficult to deal with problems of ocean space as a whole, inhibiting the development of an effective and sustainable global ocean governance. To address this fragmentation, the international community has, in various instruments, recognized the need for an integrated approach to address the problems of ocean space in a coherent, cross-sectoral, interdisciplinary and integrated manner.

5. There is therefore a need to devise an integrated global strategy under the direction of the General Assembly to review and examine the current fragmented approaches to ocean governance and advise the General Assembly on the rationalization and coordination of these efforts.

6. The Government of Malta proposes that the General Assembly request the Secretary-General to consider the possibility of the establishment of an appropriate mechanism or panel which could consider and coordinate, in consultation with the Special Envoy for the Ocean, the valuable and relevant work being undertaken by the competent organs and programmes within the United Nations system and outside the United Nations framework, to make recommendations with a view to providing options to the General Assembly on how a global strategy to ensure that all problems of ocean space are effectively considered as a whole, and to promote the realization of a more sustainable and effective ocean governance in the interest of present and future generations.

United Nations A/73/144

General Assembly

Distr.: General
18 July 2018

Original: English

Seventy-third session

Request for the inclusion of an item in the provisional agenda of the seventy-third session

Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials

Letter dated 9 July 2018 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General

On behalf of the African States Members of the United Nations, I have the honour to request, in accordance with rule 13 of the rules of procedure of the General Assembly, the inclusion of an item entitled "Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials", in the provisional agenda of the seventy-third session of the General Assembly under heading F, Promotion of justice and international law. I further request that this item be considered directly in plenary meeting.

In conformity with rule 20 of the rules of procedure of the General Assembly, an explanatory memorandum is attached to the present letter (see annex).

I should be grateful if you would have the present letter and its annex circulated as a document of the General Assembly.

(*Signed*) Lazarus Ombai **Amayo**
Ambassador
Permanent Representative of
the Republic of Kenya to the United Nations and
Chair of the African Group for July

18-11934 (E) 240718

Please recycle

Annex

Explanatory memorandum

1. The African States Members of the United Nations seek the inclusion of an agenda item on the agenda of the seventy-third session of the General Assembly, entitled "Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials".

Background

2. The legal obligations of the States Members of the United Nations are derived from, inter alia, the Charter, multilateral treaties, bilateral agreements and customary international law. Part of the latter is the immunities of Heads of State, a member of a Government or parliament, an elected representative or a government official.[1] In recent years, the issue of immunities has become one of the most pressing issues in international law, with countless academic articles offering differing legal conclusions, not helped by conflicting decisions of the Pre-Trial Chambers of the International Criminal Court.

3. The issue is of crucial concern to States Members of the United Nations and was raised extensively in General Assembly debates on the matter. In the case of a Security Council referral to the International Criminal Court, Members of the General Assembly are faced with "competing obligations" derived from the Charter, the Rome Statute, customary international law or even internal legislation with respect to immunities of Heads of State, a member of a Government or parliament, an elected representative or a government official.

4. Pre-Trial Chamber I of the International Criminal Court, while considering such situations, in the case of whether Malawi and Chad had been non-compliant in failing to arrest President Al-Bashir, found that "the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not parties to the Statute whenever the Court may exercise jurisdiction".[2]

5. In a subsequent consideration, Pre-Trial Chamber II took a different interpretive approach, recognizing that there could be instances where the issue of personal immunities of Heads of State of a non-State party may justifiably be raised before the Court and that "the solution provided for in the Statute to resolve such conflicts is found in article 98 (1) of the Statute".[3]

6. In addition, in the more recent decision of Pre-Trial Chamber II in the case of South Africa, yet another line of interpretation was adopted. According to the Chamber, "since immunity from arrest would bar the Court from the exercise of its jurisdiction, the general exclusionary clause of article 27 (2) of the Statute, in its plain meaning, also encompasses that immunity".[4] Furthermore, that if States parties were to rely on immunities to refuse cooperation, it would make the Court's role overwhelmingly difficult and that would be contrary to the purpose and object of article 27 (2).[5] Judge Marc Perrin de Brichambaut of the Court, in a separate opinion,

[1] Art. 27 of the Rome Statute.
[2] ICC-02/05-01/09-139-Corr., para. 36.
[3] ICC-02/05-01/09-195, para. 27.
[4] ICC-02/05-01/09-302, para. 74.
[5] ICC-02/05-01/09-302, para. 75.

indicated that the current state of international law is not clear enough to make "firm conclusions" pertaining to whether (a) a Security Council referral would make a non-State party analogous to a State party, making inapplicable article 98 (1) of the Statute; (b) Al-Bashir's immunity was removed by way of Security Council resolution 1593 (2005); and (c) international courts can affect the application of the customary international rule of personal immunities as it applies among States.[6] The Judge further remarked that it would have been an appropriate course of action to request an advisory opinion of the International Court of Justice on some of the bewildering international law issues.[7]

7. The advisory opinion required from the International Court of Justice on different legal and factual issues is a Charter requirement. The Rome Statute of the International Criminal Court has sought the same identical approach in its article 119 (2), thereby acknowledging the incidence of such a situation and reasserting its objectivity.

8. In pursuit of the proper application and understanding of international law, African States support international efforts to strengthen international criminal justice. It is in this connection that the African Union Assembly decided to seek an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and other senior officials.[8]

9. Accordingly, African States Members of the United Nations, in accordance with rule 13 of the rules of procedure of the General Assembly, request the inclusion of an item entitled "Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials" in the provisional agenda of the seventy-third session of the General Assembly under heading F, Promotion of justice and international law.

The benefit of an advisory opinion

10. Members of the United Nations will benefit from a General Assembly request for an advisory opinion of the International Court of Justice that will provide clarity to the evident ambiguity and to competing obligations under international law and will assist States in carrying out their obligations without undermining either the call for ending impunity or the legal regime governing the immunities of Heads of State and Government and other senior officials.

11. By having recourse to the International Court of Justice, as the principal judicial organ of the United Nations, the General Assembly would also underscore its resolve to give effect to the mission entrusted to it by the Members of the United Nations to ensure the appropriate implementation of international legal norms within the work of the United Nations and its Member States.

12. The divergence of States' practices and relying on their own interpretation rather than recourse to available international justice mechanisms thereby undermine the international justice system and the legal regime governing relations between States in its entirety.

13. By seeking the advisory opinion in the exercise of its powers under Article 96 (1) of the Charter, the General Assembly will be able to bring a lasting resolution to the long-disputed issue of immunities and the conflicting obligations of States under international law.

---

[6] ICC-02/05-01/09-302-Anx, para. 99.

[7] ICC-02/05-01/09-302-Anx, para. 97.

[8] Assembly/AU/Dec.672 (XXX), para. 5 (ii).

United Nations A/73/145

General Assembly

Distr.: General
6 July 2018

Original: English

Seventy-third session

Request for the inclusion of an item in the provisional agenda of the seventy-third session

Observer status for the International Council for the Exploration of the Sea

Letter dated 6 July 2018 from the Permanent Representative of Norway to the United Nations addressed to the Secretary-General

I have the honour to request, in accordance with rule 13 of the rules of procedure of the General Assembly, the inclusion of an item entitled "Observer status for the International Council for the Exploration of the Sea in the General Assembly" in the provisional agenda of the seventy-third session of the General Assembly.

The application is supported by all member countries of ICES.

In its decision 49/426 of 9 December 1994, the General Assembly sets out the criteria for the granting of observer status in the Assembly, stressing that the granting of observer status in the Assembly should in the future be confined to States and to those intergovernmental organizations whose activities cover matters of interest to the Assembly.

The International Council for the Exploration of the Sea (ICES) is an intergovernmental organization that coordinates and promotes marine research on oceanography, the marine environment, marine ecosystems and on living marine resources from the Arctic Ocean through the North Atlantic. The adjacent sea areas include European seas, the Mediterranean Sea and the Black Sea, the North Pacific and the southern hemisphere.

ICES was established on 22 July 1902 in Copenhagen as the result of a growing concern during the late nineteenth century over the well-being of fish stocks in the North Sea, coupled with efforts by different groups of scientists in neighbouring countries to promote and encourage international scientific marine cooperation.

In 1964, through an agreed convention, ICES received a legal foundation and full international status. The full Convention text is available from http://ices.dk/explore-us/who-we-are/Documents/ICES_Convention_1964.pdf.

Members of the ICES community include all coastal States bordering the North Atlantic and the Baltic Sea, with affiliate institutes in the southern hemisphere.

18-13357 (E) 170818

Please recycle

ICES is a network of more than 5,000 scientists from almost 700 institutes, representing close to 60 countries, adding value to national research efforts.

ICES coordinates and promotes marine research on oceanography, the marine environment, marine ecosystems and living marine resources.

Scientists working through ICES develop knowledge to advance our understanding of the marine environment, identify opportunity and risk and respond to current management challenges, based on unbiased, non-political scientific evidence, as well as anticipate scientific needs for future management challenges.

Given the international character of marine research, and through strategic partnerships, the work of ICES is applicable on a global scale.

ICES is a staunch supporter of the United Nations and its activities. ICES has already established formal cooperation agreements with the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and with the Food and Agriculture Organization of the United Nations (FAO).

As an observer of the General Assembly, ICES will be ready to contribute and engage actively in relevant work of the United Nations. This includes achieving the Sustainable Development Goals, in addition to contributing to the United Nations Decade of Ocean Science for Sustainable Development, the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, and the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects.

ICES and the United Nations have complementary goals and objectives. Greater participation of ICES in United Nations processes would be of mutual benefit.

ICES also offers capacity-building through its flexible training programme. The ICES training programme connects international expertise with identified knowledge and capacity needs, taking place at national marine science institutes and universities and delivering specialized training for scientists, policymakers and other stakeholders. ICES is further able to offer input, or contribute to major United Nations ocean sustainability programmes, as well as projects making use of its extensive network of experts and expert groups.

Science is the foundation on which successful environmental and integrated marine policies are built to achieve societally agreed objectives. Through observer status in the General Assembly, ICES may ensure its work continues to support internationally agreed policy goals and contributes to the implementation of these policy goals. Observer status will further make ICES capable of sharing over 100 years of experience of international science cooperation with the United Nations.

I have the honour to request that the present letter and its annexes be circulated as a document of the General Assembly.

(*Signed*) Tore **Hattrem**
Permanent Representative of the Kingdom of Norway

Annex I

Explanatory memorandum

The International Council for the Exploration of the Sea

1. The International Council for the Exploration of the Sea applies for observer status in the General Assembly

In its decision 49/426 of 9 December 1994, adopted without a vote, the General Assembly, on the recommendation of the Sixth Committee, and taking note of the oral report presented to the Sixth Committee on 25 November 1994 by the Chair of the Working Group on the question of criteria for the granting of observer status in the Assembly, decided that the granting of observer status in the Assembly should in future be confined to States and to those intergovernmental organizations whose activities cover matters of interest to the Assembly.

2. International Council for the Exploration of the Sea vision

It is the ICES vision to be an international scientific community that is relevant, responsive, sound and credible concerning marine ecosystems and their relation to humanity. The ICES mission is to advance the scientific capacity to give advice on human activities affecting, and affected by, marine ecosystems.

Scientists working through ICES develop knowledge, to advance our understanding of the marine environment, identify opportunities and risks and respond to current management challenges, based on unbiased, non-political scientific evidence, and anticipate scientific needs for future management challenges.

3. Membership and collaboration

ICES has 20 member countries: Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Spain, Sweden, the United Kingdom and the United States of America. ICES is funded by annual contributions from member countries, as well as through advisory services and project work.

ICES also collaborates with affiliate institutes in Australia, Chile, New Zealand, Peru and South Africa.

ICES science and advisory processes are open to observers from a diverse range of stakeholders and interest groups. ICES also works through strategic cooperation with a wide range of organizations, including non-governmental organizations and intergovernmental organizations.

4. Institution and structure

The ICES Council is the principal decision-making and policymaking body of ICES, consisting of a President and two delegates from each of the ICES 20 member countries.

ICES work is accomplished by various committees, expert groups and workshops.

5. Advantages of the International Council for the Exploration of the Sea being granted observer status in the General Assembly

ICES shares and supports the goals of United Nations initiatives on sustainable development. ICES seeks observer status in the General Assembly to access and

follow the important global policy developments in the United Nations work on ocean sustainability, climate change and biodiversity, as well as conservation and management of resources. This is relevant to ICES work to promote and encourage research and investigations for the study of the sea, particularly those related to the living resources thereof, and their interrelation with a healthy marine ecosystem.

Science is the foundation on which successful environmental and integrated marine policies are built to achieve societally agreed objectives. Through observer status in the General Assembly, ICES may ensure that its work continues to support internationally agreed policy goals and contributes to the implementation of these policy goals.

ICES has already established formal cooperation agreements with the Intergovernmental Oceanographic Commission of UNESCO and FAO.[1]

6. Advantages for the United Nations of granting observer status to the International Council for the Exploration of the Sea

The General Assembly would benefit from granting ICES observer status and thus gaining access to the ICES wealth of expertise and experience in scientific advice for policymaking and sustainable resource management.

The central focus of ICES for the coming years is to develop ecosystem understanding, in recognition of the need to develop the scientific basis for the ecosystem approach to management of the ocean. The ecosystem approach is a vital component required to achieve sustainable development goals as set out in 1992 at the Earth Summit and the World Summit on Sustainable Development in 2002, and reaffirmed in 2012 at the United Nations Conference on Sustainable Development, as well as in 2017 at the United Nations Conference to Support the Implementation of Sustainable Development Goal 14.

The work of ICES is able to support the goals of sustainable development through scientifically informed decisions; advancing the science needed for sustainable management; and sharing of best practices and/or lessons learned.

[1] http://ices.dk/explore-us/how-we-work/Pages/Scientific-cooperation.aspx.

Annex II

Draft resolution

Observer Status for the International Council for the Exploration of the Sea in the General Assembly

The General Assembly,

Wishing to promote cooperation between the United Nations and the International Council for the Exploration of the Sea,

1. *Decides* to invite the International Council for the Exploration of the Sea to participate in the sessions and the work of the General Assembly in the capacity of observer;

2. *Requests* the Secretary-General to take the necessary action to implement the present resolution.